SINGAPORE REPORTS.

In re H. SOMAPAH DECEASED.

[Orig. Civ. Juris. (Evans, J.) June 23, 1950]

[Singapore — Suit No. 242 of 1936]

Japanese Judgment and Civil Proceedings Ordinance, 1946 — Application to set aside Japanese judgment — Procedure.

In this case the applicants applied by summons-in-chambers to have orders made by the Japanese Court in 1944 set aside. These orders purported to appoint The Estate and Trust Agencies (1927) Limited and Thomas Augustine Basapah trustees of the estate of H. Somapah deceased. The last surviving trustee under the settlement of H. Somapah deceased, namely Somah Basapah, died on the 28th March, 1943, and letters of administration were granted to the applicants on the 11th December, 1943.

Held, (1) that the application should properly have been brought by originating summons but as in this case all parties were before the Court with knowledge of the matter, the application could be allowed to proceed; (2) that the order made by the Japanese Court was not legal, intelligible or workable and should be set aside.

Cases referred to :—

(1) *In re Holloway* (1894) 2 Q.B. 167.
(2) *In re Higginbottom* (1892) 3 Ch. 132.
(3) *Attorney-General v. Haji Abdul Rahman* 4 Ky. 497.
(4) *In re Benett* (1906) 1 Ch. 216.
(5) *In re Sarah Knights' Will* 26 Ch. D. 82.
(6) *Rutledges' Trusts* (1909) 1 Ch. 280.

SUMMONS-IN-CHAMBERS.

Dr. Withers-Payne for second defendants and applicants in Summons-in-Chambers No. 79 of 1950.

W. Munro for third defendant and applicant in Summons-in-Chambers No. 107 of 1950.

R. H. Green for Remaindermen (to represent all persons entitled to corpus).

Sandy G. Pillay to represent all beneficiaries entitled to income under the will.

Cur. Adv. Vult.

Evans, J. : — The only matters contested at the hearing of these summonses were those contained in paragraphs 1, 2 and 6 of summons No. 79 of 1950 and in paragraphs 1, 2 and 10 of summons No. 107 of 1950. All turn on orders made by Japanese Courts in this matter on 17th January, 1944, and 21st February, 1944, purporting to appoint the Estate and Trust Agencies (1927) Limited and Thomas Augustine Basapah trustees, and vesting property in the company.

The second defendants ask to have these Japanese orders set aside on the grounds that they are devoid of legal basis, and the third defendant company asks for parts to be set aside and for directions under these orders and the company consequently opposes second defendants' application. The company wishes to be appointed sole trustee on the grounds of convenience and efficiency. Its counsel takes, though not as such, a preliminary objection to second defendants' application, on the ground that they have adopted a wrong procedure.

These summonses are taken out in an administration suit of 1936, and are the proper method of applying to the court therein. These paragraphs of second defendants' application are, however, now based on the special legislation, the Japanese Judgments and Civil Proceedings Ordinance, 1946. That Ordinance by section 8 empowers the Rules Committee to make rules. This provision seems wholly otiose in view of the Committee's wider and inclusive powers under section 88 of the Courts Ordinance. It is quite unnecessary to suppose from this duplication that rules of a different nature are contemplated, and the rules actually made assume the Rules of the Supreme Court, and the terms, such as originating summons, have the same meaning.

Rule 3 provides that an application under section 3 of the Ordinance, that is to set aside a Japanese judgment, shall be by originating summons. On the other hand Order LI, rule 2(1) of the Rules of the Supreme Court provides that a party may join in his summons all matters upon which he then desires the order of the Court. This may seem general but is limited to cases where the party may proceed by summons. It seems to me to resemble rules of pleading; which are certainly general, and yet apply to all these proceedings, but this is not the kind of generality contemplated in the rules of construction.

These proceedings were commenced in the old Straits Settlements Court. Had they been commenced in the Japanese Court leave would have been required under section 4 to carry on the proceedings. These proceedings can be continued by virtue of Article 44 of Singapore Colony Order in Council, but the Japanese portion of them is left in some ambiguity as the ordinance embodies no general principle Japanese orders being for some purposes valid and for some invalid. To these proceedings, thus continued, Order LI rule 2(1) would apply.

The only specific provision in the ordinance for such proceedings is in section 6, and this is limited to interlocutory orders. Counsel for the trust company argued that interlocutory here might have a wider meaning and might include a final order which was not conclusive of the whole action. Interlocutory is a

word of very narrow application, while to extend it so is tantamount to ignoring it. Its value is not obvious. Had it been necessary to appoint new trustees, which is the substance of this application, it would have been properly done by summons. On the other hand the ordinary method of setting aside a final and conclusive judgment on the ground of fraud is by separate action, for this, in the special circumstances prescribed, the rules substituted an originating summons thus giving a simpler procedure, but one in the nature of an action. Furthermore, the originating summons being thus of the nature of an action, could not, on principle, be properly brought here, where an inclusive and continuing action already exists. I think it would be more correct as well as more convenient to regard the provision of rule 3 above as the general provision for procedure to set aside where the rules make no special and better provision.

In any event the Japanese Judgment Rules (No. S20/47) are subject to Order LXIII. I would be prepared to allow any necessary amendment, but the amendment would not be simple, since the bulk of the matters included in the summons is properly included. It could not be properly effected by reversing the amendment the counsel for third defendant seems to have made by altering the endorsement. He brought his application finally by summons also, and justified this, in his case, by saying that he brought it under section 6 of the ordinance and rule 16, and that the judgments in question are interlocutory. Apart from the argument already noticed and based on the terms of section 6, I should have thought this argument impossible. The reported cases, of necessity, deal with individual orders, and with none exactly like this, possibly because its finality is apparent. I think that an order definitely appointing trustees determines the parties' rights in that regard with all finality possible in human concerns. This application, itself, is not above reproach in asking to set aside part of the order, whereas, this section 6 authorises setting aside the order, and, as the ordinance in section 3 makes special provision for setting aside part of an order, it would be difficult to read section 6 in a different sense, as including setting aside part which is, in truth, varying, or amending the order.

The differences between the kinds of summonses is not great, nor always clear, as appears from the judgment of Lindley, L.J. in *In re Holloway*[1]. The principal difference is entering an appearance which here is unnecessary. The purpose of either procedure is to bring the parties before the court with knowledge of the matter and in position to answer. This matter can proceed as it is.

The main substance of the application is not contested. No one suggests the order of 17th January, 1944, is legal, intelligible, or workable. The company who obtained this order in their favour, as they clearly regard it, but subject to irksome and vague conditions, suggest that they should continue to enjoy all advantages with none of the drawbacks. They would in effect nominate themselves as sole trustees. I see little to recommend this. The beneficiary dissenting from the second defendants' application does not ask for this trustee, but for any independent trustees.

The second defendants are the legal personal representatives of Somah Basapah, and base their claim, apart from the form of the order made, on the fact that they are the legal personal representatives of the last surviving trustee under the will and as such are now the trustees. The similar claim in the English cases cited by Dr. Withers-Payne is based on section 31, Conveyancing Act, 1881, which differs in language and principle from the local provisions on which he relies section 35(1) of Cap. 118, and section 37(1) of Cap. 59. Even before the date of this ordinance, the descent of all realty had been changed, and the legal estate must vest in the personal representative subject to the trust. The English provisions (section 30, 44 and 45 Vict. Ch. 41) deal with trust and mortgaged property, but even so, the power to appoint is additional to the legal interest, and not as Mr. Munro seemed to argue merely a bare power for a limited period. Kekewich, J. discharged an earlier order appointing trustees made in chambers (*In re Higginbottom*[2]) which disregarded the interest conferred by the English statute. A court can have no hesitation in following the decision of Goldney, J. in *Attorney-General v. Haji Abdul Rahman*[3]. The section 34 referred to there is in effect section 37 of Cap. 59 relied on by applicant. The wording of this section 25(2) referred to by Mr. Munro is doubtless due to the form of the English legislation, and, is in no way apt to cut down the force of section 35 of Cap. 118.

Mr. Munro also relied on *In re Benett*[4] which has no bearing on this case, for there the personal representative made an appointment under a testamentary, and not under the English statutory power, and was as regards that estate, *functus officio*. *In re Sarah Knights' Will*[5] is more concerned with the question of how far a personal representative is obliged to exercise the powers under the English Act. *Rutledges' Trusts*[6] turns on a testamentary power of appointment of trustees being good to divest trustees by descent under the Statute *i.e.* under section 30 and not section 31. These cases were largely relied on in support of an argument that the second defendants

had repudiated the trusteeship, or refused to act, by making an application to the Syonan Kotohoin, and by accepting the order made therein and now sought to be set aside.

On the death of Somah Basapah on 28th November, 1943, Thomas Augustine Basapah and his brother issued an originating summons, in doing which they were anticipated by Lakshmi Naidu, the beneficiary before referred to as opposing. It is not clear that the former was issued in reply to the latter. Action was certainly first taken against them. In their affidavit in support they state that "By reason of the death of the said William Lawrence Soma Basapah also known as Somah Basapah, there is now no one who is competent to receive the rents and profits of the said immoveable properties and to manage and supervise the estate of the testator. There is danger that the said immoveable properties may be wasted through the tenants refusing to pay up the arrears of rents or absconding and also through the said immoveable properties falling into a state of disrepair." In fact this statement was true as on the date of the affidavit 9th December, 1943, there were no personal representatives of Somah Basapah. Thomas Augustine Basapah and his stepmother were appointed on 11th December, 1943. They appear to have been assisted by lawyers, but it is impossible on a perusal of these proceedings not to conclude that Thomas Augustine Basapah, at least, was totally unaware of his rights. These originating summonses were consolidated with the administration action. In an affidavit sworn on 16th December, 1943, and filed next day by Mr. Ess, apparently as Registrar, although in the last paragraph he speaks of "my solicitor", in paragraph 7 he swears: "there is no trustee to look after the management of the estate and to execute the trusts....." The order of 21st February, 1944, no where calls on the trustees to convey or regards them as divested although the estate had vested in them by virtue of section 35 of Cap. 118. There could be no repudiation by Thomas Augustine Basapah of trusteeship, for the whole purpose of his originating summons was to obtain his appointment thereto. Nor could such act divest his estate. Nor was there repudiation by the widow, who does not seem to have been a party to any proceedings, though she filed an affidavit in that by Lakshmi.

There can be no waiver of a right of which the person said to waive has no knowledge, and which none concerned contemplates. Nor can there, properly, be said to be any acquiescence in the order of 17th January. Dr. Withers-Payne for applicants says that an appeal was attempted, or started, there is no record of this for there was, at that time, no Court of Appeal, nor alternative to "acquiescence." It was precisely to rectify errors made in the administration of justice in such ways and circumstances that the ordinance was passed. I can see nothing in the objection to the application. If the orders be set aside, the applicants must be vested with the estates as trustees until other appointments be made, and the estates transferred to the new trustees.

Order made by Japanese Court set aside.

S. A. T. ALSAGOFF v. REX.

[App. Crim. Juris. (Murray-Aynsley, C.J.)
August 2, 1950]
[Singapore — Magistrate's Appeals Nos. 94, 95, 96 and 97 of 1950]

Municipal Ordinance (Cap. 133), ss. 3 and 144 — Carrying out of building operations — Liability of owner — Definition of "owner" — Mandatory order.

In this case the appellant appealed against his conviction under section 144 (7) of the Municipal Ordinance. It appeared that the houses had been built by squatters on the appellant's land.

Held, (1) that there was no evidence to show that the appellant was the "owner" of the buildings concerned, within the meaning of the definition of "owner" in section 3 of the Municipal Ordinance and therefore there was no evidence that he was liable under section 144 of the ordinance; (2) that before a mandatory order can be made the procedure laid out in section 255 of the Municipal Ordinance must be followed and as this was not done in this case and as there was no evidence that the appellant was the person liable under section 144 of the ordinance, the appeals must be allowed.

MAGISTRATE'S APPEALS.

Mark Morrison for the appellant.

A. H. Simpson (D.P.P.) for the Crown.

Murray-Aynsley, C.J. : — In this case there were four charges against section 144(7) of the Municipal Ordinance.

The appellant was fined $20 in each case and mandatory orders were made.

The appellant claimed trial.

In various respects the trials were unsatisfactory. Firstly the Court does not seem to have had regard to the definition in section 3 of owner. This definition does not seem to be excluded by the context and it is exclusive of any other meaning of the word. There does not seem to have been any evidence that the appellant was "owner" within this definition. I do not agree with Mr. Walters on this point.

Further a mandatory order cannot be made in any case unless the procedure set out in section 255 is followed. It was not done in this case.

For these reasons the appeals must be allowed.

A further point which I do not decide is whether sub-section 12 applies to the case of a wholly new building. Mr. Walters in his Commentary thought not.

Appeals allowed.